84-1414 (?) No. 84-1258

Office - Supreme Court, U.S.
FILED
APR 4 1985
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

FREDRIC HABERMAN, *et al.*,

Petitioners,

— v. —

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

21 RESPONDENTS' BRIEF OPPOSING CERTIORARI

JOHN D. LOWERY*
STIMSON BULLITT

RIDDELL, WILLIAMS, BULLITT & WALKINSHAW
4400 Seattle-First National Bank Building
Seattle, Washington 98154
(206) 624-3600
Counsel for 21 Respondents

**Counsel of Record*

FRAYN PRINTING, SEATTLE, WASHINGTON

No. 84-1258

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

FREDRIC HABERMAN, *et al.*,

Petitioners,

— v. —

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

21 RESPONDENTS' BRIEF OPPOSING CERTIORARI

JOHN D. LOWERY*
STIMSON BULLITT

RIDDELL, WILLIAMS, BULLITT & WALKINSHAW
4400 Seattle-First National Bank Building
Seattle, Washington 98154
(206) 624-3600
Counsel for 21 Respondents

**Counsel of Record*

TABLE OF CONTENTS

PAGE

Reasons For Denying the Writ

I. Former Bondholders Had No Interest To Justify Intervention 1

II. Present Bondholders — No Right To Intervene Under Court Rule 2

A. Civil Rule 24 — Intervention 2

1. Application Was Not Timely 2

2. The Bank Adequately Represented Petitioners' Interest 3

a. No Difference in Objective of Existing Party (Chemical Bank) 3

b. Bank's Performance Was Not Shown To Have Been Inadequate 3

B. Civil Rule 19 — Petitioners Did Not Show Themselves Entitled To Be Joined as Indispensable Parties 4

III. No Due Process Issues Raised 4

REASONS FOR DENYING THE WRIT

The 21 Respondents[1] (among the 90 respondents in this case) submit this brief to support their respectful request to this Court to deny certiorari.

Petitioners assert that the Washington Supreme Court denied them due process by denying their motion to intervene as parties plaintiff in the case of *Chemical Bank v. WPPSS et al.* ("*Chemical Bank II*"), 102 Wn.2d 874, 691 P.2d 524 (1984), now before this Court on pending petition for certiorari as *Chemical Bank and WPPSS v. PUD #1 of Benton County et al.*, No. 84-1258.

I. FORMER BONDHOLDERS HAD NO INTEREST TO JUSTIFY INTERVENTION

In the action in which Petitioners sought to intervene, the plaintiff, Chemical Bank, was the designated trustee[2] for holders of bonds issued by Washington Public Power Supply System ("WPPSS") for its nuclear generating Projects No. 4 and 5. Plaintiff Bank sought as relief a declaratory judgment that the Participant/respondent public utilities had an enforceable contractual obligation to pay to WPPSS money with which WPPSS, in turn, could pay the principal and interest on the bonds that it had issued.

Petitioners identify themselves as "present and former bondholders" (Petit. 3) of WPPSS No. 4 and 5 bonds. Those Peti-

---

1. *Oregon:* City of Bandon. *Montana:* Glacier Electric Cooperative. *Nevada:* Wells Rural Electric Co. *Washington:* City of Port Angeles, Centralia Electric Light, McCleary Light and Power, Elmhurst Mutual Power & Light Co., Ohop Mutual Light Company, Okanogan County Electric Cooperative, Inc., Parkland Light & Water Co. *Idaho:* Cities of Bonners Ferry, Burley, Heyburn, Idaho Falls and Rupert; Clearwater Power Co., Idaho County Light & Power Cooperative Assn., Inc., Northern Lights, Inc., Prairie Power Cooperative, Inc., Rural Electric Co. and Unity Light & Power Co.

2. Under Section 11.4 of the Bond Resolution (WPPSS Board Resol. 890; CS 128, Attachment; CP 6605), Chemical Bank is authorized to represent the bondholders' interest in general and, in particular, to represent them by legal action in event of a default. WPPSS has indicated that the "event of default" occurred in 1983, when WPPSS admitted "its inability to pay its debts . . . as they became due." Chemical Bank's First Interrogatories to WPPSS, p. 2, 7/22/83.

tioners who are former bondholders lack an interest relating to the property or transaction that is the subject of the action. These former holders, who may have claims against those responsible for their losses when they sold their bonds, have no interest in compelling payment on bonds that they do not own.

II. PRESENT BONDHOLDERS — NO RIGHT TO INTERVENE UNDER COURT RULE

A. Civil Rule 24 - Intervention.

1. *Application Was Not Timely.*

When they sought to intervene, Petitioners proposed: (1) to return the case to the trial court without first deciding the pending appeal; (2) to more than double the number of parties (then and now 90); and (3) to raise new issues (e.g., negligence, professional malpractice, failure of plaintiff Bank to represent the bondholders' interest adequately Motion, pp. 17-21 and 33-34, prayers for money damages, reformation, and other injunctive relief).

The State of Washington provides no statutory right to intervene in a case of this kind. Washington provides for intervention under the terms of its Civil Rule 24, the language of which is identical to that of Federal Civil Rule 24, in all relevant particulars.

Petitioners declare that "[N]either Washington statutes nor case law imposed a timeliness requirement for a motion to intervene" (Petit. 19). True, but Petitioners did not seek to intervene under the authority of either a statute or a case. They sought to intervene under the authority of court rules, and the applicable rule provides for intervention "upon timely application" (CR 24).

Petitioners did not serve or file that motion to intervene until January, 1984. This was 1⅔ years after the action had been started (May, 1982). During the intervening 20 months the case had been intensively litigated, judgment had been entered twice, and the second appeal to the Washington Supreme Court then was pending.

Petitioners did not allege that they were unaware of this well-publicized case, nor did they allege circumstances that might have excused their delay in moving to intervene. Petitioners showed no facts that might have excused their having stood by until they observed a decision with which they disagreed before they sought to enter the case — and not only to enter it but, in effect, to start it all over again.

2. The Bank Adequately Represented Petitioners' Interests.

a. No Difference in Objective of Existing Party (Chemical Bank)

As bondholders, Petitioners had an interest, of course, in an action that sought a declaration that someone should pay them money, and the disposition of the action would affect their ability to protect that interest. However, such a showing of interest is not enough to give a right to intervene if the would-be intervenors (Petitioners) cannot show that the existing party did not adequately represent them.

As the contractually designated trustee, Chemical Bank performs the function of pursuing the bondholders' interest in this action. Petitioner bondholders had the same objective as the Bank: obtaining payment on the bonds. As bondholders among bondholders, Petitioners had an identity of interest with all WNP 4 and 5 bondholders, and the Bank represented all. To add Petitioners as parties would have duplicated rather than assisted.

The identity of interest and objective in this action between Petitioner bondholders and plaintiff Bank as the designated trustee for all bondholders provided for no right of intervention on this ground.

b. Bank's Performance Was Not Shown to Have Been Inadequate

Where inadequacy of representation cannot be shown to be caused by divergent objectives, it must be shown to depend on the existing parties' performance: collusion, bias, incompetence, indolence, inexperience, etc. This inadequate perfor-

mance may result directly from the counsel for existing parties or indirectly from these parties directing their counsel.

Here, Petitioners did not show that plaintiff Bank had attempted to induce its counsel to act against the interests of the WNP No. 4 and 5 bondholders in general, or of Petitioner bondholders in particular.

Nor did Petitioners allege bias, incompetence or lack of diligence by plaintiff Bank's respected and experienced counsel.

B. Civil Rule 19 — Petitioners Did Not Show Themselves Entitled To Be Joined as Indispensable Parties

When they sought to intervene, although Petitioners declared themselves to be indispensable parties (Motion at 2, 22), they did not show facts that gave them a right to be joined on this ground. In actuality, CR 19 denies "indispensability" status to an interested person that already is adequately represented by others with the same interest.

Nor did Petitioners, either in their motion to intervene or in their Petition to this Court, allege an inability for any reason to seek relief in other litigation.

III. NO DUE PROCESS ISSUES RAISED

Because Petitioners failed to show a right to intervene, the Washington Supreme Court did not deny Petitioners due process of law by denying their motion to intervene.

Respectfully submitted April 5, 1985.

JOHN D. LOWERY

STIMSON BULLITT

RIDDELL, WILLIAMS, BULLITT & WALKINSHAW
Counsel for 21 Respondents